So also in the *City of Denver* v. *Davis*, 37 Colo. 370, 6 L. R. A. (N. S.) 1013, it was held that the city was liable for a fire resulting from a servant of the health department depositing ashes, paper, straw, rags, and like material upon a dumping ground, the maintenance of such ground being for the convenience of the inhabitants and not performed in the exercise of any governmental function. But in *Ft. Worth* v. *Crawford*, 64 Tex. 202, 53 Am. Rep. 753, 74 Tex. 404, 15 Am. St. Rep. 840, the establishment of a dump yard was held to be a sanitary measure and to involve a public and not a corporate duty, though the municipality was liable in case it negligently permitted the dump to become a nuisance, while in *Ostrom* v. *San Antonio*, 94 Tex. 523, the court held that a city, while engaged in cleaning its streets and disposing of garbage, acts for the benefit of its own people, and not in the discharge of the duties of the general public, and is liable for the unlawful acts of its agents in so doing. The New York Court seems at the outset to have washed its hands of the whole matter of laying down any criterion by saying, "All that can be be done probably with safety is to determine, as each case arises, under which class it falls," *Lloyd* v. *Mayor, etc., of New York*, 5 N. Y. 369, 55 Am. Dec. 347; but see the statement of the principle of exemption in *Hayes* v. *Oshkosh*, 35 Wis. 314.

In the principal case, if the test of pecuniary profit to the city be applied, or if the function of street cleaning be considered as relating to the health of the citizens, the act must be held governmental. The whole difficulty lies in the fact that as yet no definite test has been formulated which has been generally adopted. In view of the increasing assumption by our cities of greater and more varied corporate activities, it is essential that some definite line be drawn, that some uniform rule be used as a standard guide, before the whole subject of municipal liability is befogged by a mass of conflicting decisions. N. K. F.

SOME VIEWS OF THE NATURE AND EFFECT OF CORPORATENESS.—The wide application of the corporate form of organization to the various enterprises of an increasingly complex business world during the past century has brought not only great additions, but some substantial modifications, to the body of corporation law. It has thrown new light upon the meaning and legal effect of corporateness itself. See 1 WILGUS, CORP. CAS., 72 *et seq.*, 109 *et seq.*, 157 *et seq.* A case recently before the Federal court in New York is illustrative of this latter fact. In an opinion which declared that the undertaking and obligation of one subsidiary corporation to assume the debt of another subsidiary corporation was in effect the undertaking and obligation of the parent or holding corporation of both, the court proceeded to summarize, in so far as it was applicable to the case before it, the present state of the law upon this important question. "There are," it was said, "at least two exceptions to the general rule of separate corporate existence and liability, * * * viz.: (1) The legal fiction of distinct corporate existence * * * will be disregarded, when necessary to circumvent fraud. (2) It may also be disregarded in a case where a corporation is so organized and controlled, and its affairs are so conducted, as to make it merely an instrumentality or adjunct

of another corporation." *Hunter* v. *Baker Motor Vehicle Co.* (1911), 190 Fed. 665. This statement of the law is in accord with authorities generally. See 2 COOK., CORP., Ed. 6, §§ 663, 664, at p. 1983, and cases cited and discussed in Note 3, to p. 1984; 5 THOMP., CORP., Ed. 2, § 5470; CLARK & MARSHALL, PRIV. CORP., § 7 (e), etc. In its "general rule" portion it appears to hark back to the view of a corporation expressed by Chief Justice MARSHALL in the *Dartmouth College Case,* 4 Wheat. 518, at p. 634; 4 L. Ed. 629; 1 WILG., CORP. CAS., 708, at p. 713, in its "two exceptions," if regard be had to the lines of cases upon which they are undoubtedly based (see citations supra) to that presented by Mr. MORAWETZ in his work. MORAWETZ, PRIV. CORP., Ed. 2. Preface and §§ 1, 227, 231 inc., 725. Taken as a whole, even so far as it goes, it does not fairly and accurately present the developed modern conception of a corporation, nor the meaning of this as a modification of ideas earlier held. It is the court sitting in equity and applying equitable principles which has educed this newer conception, pointing out features of corporateness not before so fully regarded and emphasized, qualifying and restricting the significance of those, and of one in particular, already announced. See MORAWETZ, PRIV. CORP., § 227; *Cincinnati Volksblatt Co.* v. *Hoffmeister,* 62 Ohio St. 189, 56 N. E. 1033, 78 Am. St. Rep. 707, 48 L. R. A. 732; *First Nat'l Bank* v. *Trebein Co.,* 59 Ohio St. 316, 52 N. E. 834, and cases cited therein; *Brundred* v. *Rice,* 49 Ohio St. 640, 32 N. E. 169, 34 Am. St. Rep. 589; *Pott & Co.* v. *Schmucker,* 84 Md. 535, 36 Atl. 592, 57 Am. St. Rep. 415, 35 L. R. A. 392; *Home Fire Insurance Co.* v. *Barber,* 67 Neb. 644, 93 N. W. 1024, 108 Am. St. Rep. 716, 60 L.R.A. 927; *In re Rieger,* 157 Fed. 609, etc. The cases which have come before the courts to effect this result fall rather easily into classification. There is first that class in which there has been an attempted misuse of corporate organization to escape some legal obligation. More particularly this includes those cases wherein an individual, partnership, association, or corporation attempts thus to evade the effects of insolvency or business failure, or to defeat creditors generally. *First Nat'l Bank* v. *Trebein Co., supra; In re Horgan,* 97 Fed. 319; *Metcalf* v. *Arnold,* 110 Ala. 180, 55 Am. St. Rep. 24, 1 WILG., CORP. CAS., 97; 5 THOMP., CORP., Ed. 2 § 5471; to avoid restrictive contracts, *Nat'l Recording Safe Co.* v. *Int. Safe Co.,* 158 Fed 824; *Pratt* v. *Wilcox Mfg. Co.,* 64 Fed. 589; *Gormully, &c. Mfg. Co.* v. *Bretz,* 64 Fed. 612; *Beal* v. *Chase,* 31 Mich. 490; or injunction, *Miller & Lux* v. *Rickey,* 127 Fed. 573; aff'd 152 Fed. 11; *Westervelt* v. *Nat'l Mfg. Co.,* 33 Ind. App. 18; or otherwise to escape responsibility under the law for its acts; *Meilly Co.* v. *London, etc. Ins. Co.,* 142 Fed. 873; aff'd 148 Fed. 683; *Donovan* v. *Purtell,* 216 Ill. 629, 75 N. E. 234, 1 L. R. A. (N. S.) 176n; *Cupples' Hardware Co.* v. *Ill., &c. Co.,* 51 La. Ann. 64, 24 South. 604. Viewing these attempts as actively or constructively fraudulent, the courts have declared them vitiated by that fact. *Brundred* v. *Rice, supra,* and "looking through form to the substance of things," *In re Rieger, supra,* has dealt with "the acts of the real parties * * * as though no such corporation had been formed." *First Nat'l Bank* v. *Trebein Co., supra.* The rule, and its reason, are made more clear by its limitations. There must be fraud, *Moore, etc. Hardware Co.* v. *Towers Hardware Co.,* 87 Ala. 206, 13 Am. St. Rep. 23, Note, and if there be other stock-

holders, *Kramer* v. *Old*, 119 N. C. 1, having a substantial interest in the corporation, *Davis, etc. Co.* v. *Davis, etc. Co.*, 20 Fed. 699, neither it nor they will be held, unless such stockholders are chargeable with notice of the fraud. *Nat'l Conduit, etc. Co.* v. *Conn., &c. Mfg. Co.*, 73 Fed. 491. See also *Averill* v. *Barber*, 6 N. Y .Supp. 255. A second class of cases are those in which one corporation, for the purpose of evading some law, *U. S.* v. *Milwaukee, etc. Transit Co.*, 142 Fed. 247, or for the sake of more effective business management, organizes and controls through ownership of its stock, another corporation. This is the case of the "parent" or "holding," and the "subsidiary" corporation. See 2 COOK, Ed. 6, § § 663, 664, at pp. 1980, 1987, and cases discussed in Notes. Where fraud taints the transaction the courts have applied the same principles as in the line of cases discussed above, and to the same effect. *U. S.* v. *Milwaukee, etc. Transit Co., supra.* But otherwise the parent company may be held, upon the principles of agency, *Interstate Tel. Co.* v. *Baltimore, etc. Tel. Co.*, 51 Fed. 49, or upon the ground of the substantial identity of the two corporations, *Union,etc. Ry.* v. *Chicago*, 163 U. S. 564; *Central, etc. Co.* v. *Kneeland*, 138 U. S. 414, for the obligations of the subsidiary or "dummy" corporation. Compare *Kelly* v. *Ning Yung Benev. Ass'n*, 2 Cal. App. 460, 84 Pac. 321; and *Trimble* v. *Tex., etc. R. Co.*, 199 Mo. 44, 97 S. W. 164. In a third class of cases, all the stockholders and officers of a corporation, acting, so to speak, *incognito*, have attempted to accomplish without formal corporate action, but in behalf of the corporation, what the corporation itself is forbidden by positive law to do. Here again the court, looking to substance rather than form, has declared that the corporation has in fact acted. *State* v. *Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *People* v. *North River Sugar Ref. Co.*, 121 N. Y. 582, 24 N. E. 834, 18 Am. St. Rep. 843, 32 AM. & ENG., CORP. CAS. 149, 1 WILG., CAS., 100.

Up to within a century, TAYLOR, PRIV. CORP., Ed. 2, § 22, the principal view of incorporation was that it created "an artificial legal person," *Warner* v. *Beers*, 23 Wend. 103, per Senator VERPLANCK; *Dartmouth College* v. *Woodward, supra*, per Chief Justice MARSHALL, at p. 634, and that idea is still firmly imbedded in our law, see 2 COOK, CORP., Ed. 6, § § 663, 664, at p. 1975, *et seq.*, but since then the cases above referred to, and others in which equitable principles have been involved, MORAWETZ, PRIV. CORP., Ed. 2, § § 228 to 231, see also *Keokuk Electric Ry. Co.* v. *Weisman*, 146 Iowa 679, 126 N. W. 60, have furnished the basis for vigorous attack upon it. See 1 WILGUS, CORP. CAS., 109 *et seq.* This attack seems first to have been made by the Supreme Court in *Hope Ins. Co.* v. *Boardman*, 5 Cranch 57, 3 L. Ed. 36, see *U. S.* v. *Milwaukee, etc. Transit Co., supra*, 1 WILGUS, CORP. CAS., 109, 110, ten years before the *Dartmouth College* decision. Mr. MORAWETZ in 1886 (Ed. 2), writes protestingly, upon the ground of the injustice worked by the strict application of the "legal person" theory, and he may be considered the promulgator of the theory that a corporation is a "collection of individuals," 1 KYD, CORP. 13. MORAWETZ, PRIV. CORP., Ed. 2. Preface and § 227. Mr. MORAWETZ, however, writes sanely and conservatively, presenting a logical and well-proportioned view. Later writers and courts have not done so well.

Two ideas in particular have been advanced which would seem to warrant this statement. One of these is that to look upon a corporation as a "legal person" is to indulge in a mere metaphysical abstraction, and the conception should be abandoned entirely as at best confusing, TAYLOR, PRIV. CORP., Ed. 2, § 51; the other is that a corporation is to be regarded as a "legal person" or legal entity except in certain cases. See discussion of *Hunter* v. *Baker Motor Vehicle Co., supra.* It is submitted that the cases above mentioned will support no such doctrines. Of the first class, those wherein the corporation has been held liable may generally if not always, be justified upon the principle of notice. *Nat'l. Conduit, etc. Co.* v. *Conn. Pipe, etc. Co.*, 73 Fed. 491; *Young, &c. Lock-Nut Co.* v. *Young, etc. Mfg. Co.*, 72 Fed. 62; *Pratt* v. *Wilcox Mfg. Co., supra; Page* v. *Russia Cement Co.*, 51 Fed. 941. Certainly here is no denial, or even disregard, of the legal identity or individuality; it is the legal entity which is held. In those which hold the individual or individuals to be liable, the court has repeatedly declared that it would look beyond form to the substance of things, *Riverdale Cotton Mills* v. *Alabama, &c. Co.*, 198 U. S. 188, 49 L., Ed. 1008, 25 Sup. Ct. 629, but this must be understood in its proper sense. To reach the individual or individuals sought, it will strip off their corporate mask, it will penetrate their disguise, *Home Fire Ins. Co.* v. *Barber, supra; First Nat'l Bank* v. *Trebein Co., supra,* it will look behind any screen, *Leigh* v. *Kewanee Mfg. Co.*, 127 Fed. 990, or shield, *Interstate Tel Co.* v. *Baltimore, etc Tel. Co., supra,* as cited and discussed in *In re Rieger, supra,* just as always, in case of fraud, it will set aside the most solemn forms of law. *Brundred* v. *Rice, supra.* If the proceeding of the court in these cases adds strength to the view that a corporation is a collection of individuals, it does not detract from the view that it is also a legal entity. (See cases limiting doctrine, *supra.*) The legal entity is at most avoided for the time being, in analogy to cases wherein deeds are avoided in case of fraud. In the second general class of cases the corporation is held, hence the legal entity is not denied. The third class of cases in its facts presents difficulties for anyone attempting to deny either one or the other of the views of corporateness yet mentioned. The entity is being pursued, and is finally punished, on the ground that it has acted contrary to law, although it has not acted formally. To so hold it, it is necessary to look to the fact that the legal entity is a composite, collection of individuals. It is difficult to see how the court could entertain the view which it does in these cases, without recognizing and considering, also, another feature of corporateness, the franchise.

How, indeed is it possible in *any* well-rounded or complete conception of corporateness to disregard, or minimize, or in any way subordinate the one to the other, its three elements, or features, the association or collection of individuals, the franchise, and the legal entity? Our conception of corporateness has been a developing one. The fact long antedated the explanation or definition of it in the English common law. See 1 WILG., CORP. CAS., pp. 74-77. By COKE's time, and somewhat before, it was understood to be an artificial person, created "by the policy of man" and granted certain capacities. COKE so declared it. 1 INSTITUTES, 2 a, 250 a, and he was followed by HALE, ANAL., § 22, and by BLACKSTONE, 1 COM. 467, 468. KYD accepted this view, 1

CORP. 13, 15, but placed especial emphasis upon the conception of a corporation as a "collection of many individuals," 1 CORP. 13. *In the Dartmouth College Case, supra,* both these ideas appear, per Chief Justice MARSHALL, at p. 634, per Justice STORY, at p. 666, and with them a third, the corporation as a franchise, per Justice WASHINGTON, at p. 661. This latter view had already been announced in 2 BLACKSTONE, COM. 37, and in KYD, CORP. 14. It was later developed by KENT (2 Com. 263, 3 Com. 458), and others. See 1 WILGUS, CORP. CAS., 157 *et seq.* It was left for Mr. MORAWETZ to lay new emphasis upon an element of corporateness earlier pointed out by KYD. The truth of the matter seems to be that the changing necessities of the case have caused courts and writers at various times to rely upon sometimes one, sometimes the other, of these necessary parts of a complete conception of a corporation as a legal thing, and thus to give particular prominence to that part.

It is not easy to see how the use of the word "persons" as describing or defining one element of corporateness, is fraught with such difficulty to the understanding as some would suppose it to be. See TAYLOR, PRIV. CORP., Ed. 2, § 51; *Cin. Volksblatt Co.* v. *Hoffmeister, supra,* etc., and this even though the word be regarded as purely figurative. Moreover there is ground for the opinion that a "person" in the law is nothing more nor less than a unit to which certain rights and duties attach. See *"persona,"* 2 BOUVIER, DICT. 661; 1 WILG., CORP. CAS., 72 *et seq.* If this be true a corporation should come within the definition, and it is probably in this sense that men have always regarded, or at least do in our day regard, corporations as "persons." The use of the word would seem to be one that the veriest wayfarer might comprehend. It is interesting to note the results of attempts to dispense with it. One who declares that the term is one of "unnecessary mystification" suggests the following definition: "A corporation, considered as a legal institution, is the sum of the legal relations resulting from the operation of rules of law, in its constitution upon the various persons, who, by fullfilling the prerequisite conditions bring themselves within the operation of these rules." TAYLOR PRIV. CORP., Ed. 2, § 36. Perhaps the most satisfying and comprehensive statement of the meaning of corporateness which has come from the courts in recent times is that of MINSHALL, J., in *First Nat'l Bank* v. *Trebein Co., supra,* in language which he later substantially adopts in *State* v. *Standard Oil Co., supra.* We quote it in part. "In contemplation of law, a corporation is a legal entity, an ideal person, separate from the real persons who compose it. The fiction, however, is limited to the uses and purposes for which it was adopted, convenience in the transaction of business, and in suing and being sued in its corporate name, and the continuance of its rights and liabilities, unaffected by changes in its corporate members. But the fiction cannot be abused, etc." A comparison of this with the statement of Lord COKE himself may not be without profit and instruction. "It is also called a corporation, or a body incorporate, because the persons are made into a body, and are of a capacity to take and grant." It "is a body to take in succession, framed (as to that capacity) by policie, and thereupon it is called * * * a body politike." 1 INST. 250 a.

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